

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
WASHINGTON, D.C. OFFICE**

SOUTHERN BAKERIES, LLC

and

Case 15-CA-174022

BAKERY, CONFECTIONERY, TOBACCO  
WORKERS, AND GRAIN MILLERS UNION

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**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
ON REMAND TO THE ADMINISTRATIVE LAW JUDGE**

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Counsel for the General Counsel (General Counsel) respectfully submits this Brief in response to the Remand Order issued by the National Labor Relations Board (Board) on December 7, 2018. This matter has been remanded to the Administrative Law Judge (ALJ) for further consideration in light of the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017). A total of seven rules are subject to the Board's Remand Order. Three of those rules are clearly lawful under *Boeing* and the parties have submitted a written stipulation of dismissal as to those rules. This Brief will address the remaining four rules: 1) prohibiting conduct which could damage the business or reputation of the Company; 2) prohibiting the use of Company time or resources for personal use without authorization; 3) prohibiting off-duty conduct which could impact an employee's ability to perform his job; and 4) prohibiting unauthorized entry by an employee.

## **I. Procedural Background**

In a charge filed on April 14, 2016, the Bakery, Confectionery, Tobacco Workers, and Grain Millers Union (the Union) alleged that Southern Bakeries, LLC (Respondent) violated Section 8(a)(1) of the Act by maintaining certain unlawful rules. The Region found merit to this charge and an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing issued on September 28, 2016. A hearing was held on January 11 and 12, 2017 in Hope, Arkansas, before ALJ Arthur J. Amchan. ALJ Amchan rendered his decision on May 11, 2017 in JD-33-17, finding that some of the alleged rules were unlawful.

On July 24, 2017, Respondent filed Exceptions to the ALJ's Decision. The General Counsel filed Cross-Exceptions on September 26, 2017 and submitted an Answering Brief to Respondent's exceptions on the same date. Respondent filed a Reply Brief in support of its exceptions on October 10, 2017, and an Answering Brief to the General Counsel's Cross-Exceptions on October 31, 2017. The General Counsel submitted a Reply Brief in support of the cross-exceptions on November 14, 2017.

While this case was pending before the Board on exceptions, the Board issued its decision in *The Boeing Company*, overruling the "reasonably construe" test in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004).

On May 1, 2018, the Board issued a Decision and Order in the consolidated *Southern Bakeries* cases in which it severed Case 15-CA-174022 (the case herein) and retained those issues for future resolution. *Southern Bakeries, LLC*, 366 NLRB No. 78 (May 1, 2018). The Board's order remanding the handbook rules to the ALJ issued on December 7, 2018.

## II. Facts

### A. Respondent's Handbook Rules

Since 2005, Respondent has maintained an employee handbook (the Handbook) at its commercial bakery facility in Hope, Arkansas. (Tr. 282).<sup>1</sup> It is undisputed that the following rules have been maintained since at least October 2015 and continue to be maintained in the Handbook. (Tr. 282; JX 1 # 3; JX 2; GCX 1[y] at ¶7).

#### **1. Respondent maintains a rule prohibiting conduct which could interfere with or damage the business or reputation of the Company.**

The Handbook contains the following rule:

Facility Rules and Disciplinary Procedures. [...] Group A. These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. *Any conduct, which could interfere with or damage the business or reputation of the Company*, or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge. (JX 2 at 17, emphasis added).

Respondent presented no evidence in connection with the aforementioned rule.

#### **2. Respondent maintains a rule prohibiting the use of Company time or resources for personal use without authorization.**

The Handbook contains the following rule:

Using Company time or resources for personal use unrelated to employment with the Company without proper authorization. This includes leaving Company property during paid breaks or leaving your assigned job or work area without permission. (JX 2 at 17).

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<sup>1</sup> "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. "JX" references are to the numbered Joint Exhibits. Transcript references will be denoted by "Tr." followed by the page number(s). References to "ALJD" are to the pages and lines of the decision of the ALJ as follows: ALJD page(s):line(s).

General Manager Rickey Ledbetter testified that this rule ensures that team members are present throughout Respondent's continuous manufacturing process. (Tr. 290). Ledbetter testified that this ensures that steps in the process are not missed, protecting against product loss and additional labor costs. (Tr. 292). Ledbetter also explained that the rule only prohibits employees from leaving the facility during their paid 15-minute breaks; the rule does not prohibit employees from leaving during their unpaid 30-minute lunch break. (Tr. 291).

**3. Respondent maintains a rule prohibiting off-duty conduct which could impact an employee's ability to perform his or her job.**

The Handbook contains a rule prohibiting "[a]ny off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job." (JX 2 at 18). General Manager Ledbetter testified that this rule applies to illegal off-duty conduct, giving examples such as shooting people at an airport or harassing one of Respondent's customers. (Tr. 293-94).<sup>2</sup>

**4. Respondent maintains a rule prohibiting off-duty employees from entering the facility without authorization.**

The Handbook contains the following rule: "Group B, Rule 7. Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized entry by employee." (JX 2 at 19). Ledbetter testified that the purpose of this rule is to maintain control of who enters the facility. (Tr. 296). He testified that this rule is intended to maintain the safety of the food product as well as the safety of current employees. (Tr. 296-97). Current employees are not barred from the premises, but are prohibited from entering the facility when they are not scheduled to work without prior authorization from management. (Tr. 307).

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<sup>2</sup> Although Ledbetter testified to examples of prohibited conduct, he admitted that there are no examples of prohibited off-duty conduct listed in the Handbook. (Tr. 305).

### III. Legal Analysis

#### A. Respondent's vague rule prohibiting conduct which could interfere with or damage the business or reputation of the Company is unlawfully overbroad.

Under *Boeing*, work rules affirming common standards of civility among employees are category 1 rules and are lawful. This rule, however, prohibits criticism or other conduct detrimental to Respondent's reputation or business, which falls into category 2 and thus requires individualized scrutiny. The General Counsel submits that the negative impact of this rule upon employees' Section 7 rights is readily apparent and Respondent failed to articulate any business justification for the maintenance of this rule.

In *Boch Honda*, the Board found a very similar rule to be unlawfully overbroad. That rule admonished employees from "engaging in any activity which could harm the image or reputation of the Company." 362 NLRB No. 83 (2015). Although the Act does not protect employee conduct aimed at disparaging an employer's product, Respondent's rule is overbroad as it provides no examples or context that would suggest the provision is only aimed at unprotected conduct. The rule is reasonably read to encompass protected conduct, such as employees engaging in public criticism of Respondent's labor policies, which could damage Respondent's business and reputation. *Boch Honda, supra*; see also *NLRB v. IBEW, Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 468-71 (1951).

Where, as here, the rule sets forth no examples to guide an employee's understanding of the scope of such a rule, an employee would reasonably understand that labor protests or public criticism of its policies are prohibited and refrain from engaging in such activities. See *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 fn. 5 (2014) (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner

that the conduct would be detrimental to the interest or reputation of the Company”). Thus, under the closer scrutiny required by *Boeing*, this rule is an impermissibly vague restraint on protected employee behavior which outweighs Respondent’s unspecified interest in maintaining such a rule.

**B. Respondent’s rule prohibiting the use of Company time or resources for personal use without authorization is unlawful.**

The rule prohibiting employees from using “company time” for “personal use unrelated to employment with the company” is unlawfully overbroad, because the vague term “company time” fails to distinguish between employee rights during working time and break time (ALJD 12:21-28). Respondent’s contention that the rule is justified by its need to ensure that employees are present and available to work at all times during the continuous manufacturing process was properly rejected by the Judge when he initially considered this rule. As the Board stated in *Dish Network*, “rules which ban union activities during “company time” are presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprises.” *Dish Network Corp.*, 359 NLRB No. 108, slip op. at 1, n. 1, 5-6 (2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 872-873 (2011), *enfd.* in part, 805 F.3d 309 (D.C. Cir. 2015) (rule prohibiting “activities other than Company work during working hours” unlawfully overbroad); *cf. Our Way, Inc.*, 268 NLRB 394, 395 (1983) (rules using “working time” are presumptively valid because the term signifies periods when employees are performing actual job duties, period which do not include the employees’ own time such as lunch and break periods). The *Boeing* decision does not overrule this well-established precedent and the Judge’s initial determination that this rule constitutes an unwarranted infringement on employees’ Section 7 rights should not be disturbed.

**C. Respondent's rule restricting off-duty conduct by employees is unlawful.**

Respondent maintains the following rule, which warrants individualized scrutiny under *Boeing*, as it seeks to regulate off-duty conduct by employees.

Any off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job. (JX 2 at 18).

General Manager Ledbetter testified that this rule is justified by Respondent's interest in prohibiting illegal or undesirable conduct employees may engage in while off-duty, such as engaging in a shooting rampage or harassing a customer of Respondent (Tr. 293-94). This rule, however, contains no limiting language or examples which would permit employees to understand that the scope of this rule is aimed at the extreme examples provided by Ledbetter.

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. Where a rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. See *Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Here, Respondent's rule is so broad and amorphous that it wholly fails to define any limits to the rule. It is readily understood to include perceived disloyal conduct, such as strike activity or public criticism of Respondent's labor policies. See *First Transit*, *supra*, at 619 n. 5 (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company").

In *Hyundai America*, the Board found lawful a rule which prohibited "exhibiting a negative attitude toward or losing interest in your work assignment" 357 NLRB at 861. The

Board reasoned that the rule was lawful since it was limited only to an employee's attitude toward a given work assignment, it would not be construed as prohibiting protected activity. The rule at issue here is not narrowly tailored to the job assignment and instead, addresses the employee's job as a whole.

This rule's potential negative impact to restrain protected activities by employees clearly outweighs Respondent's interest in maintaining such a rule. To the extent that Respondent has a legitimate business interest in prohibiting employees from engaging in conduct which interferes with business relationships with customers, a more narrowly tailored rule would accommodate such interests.

**D. Respondent's rule restricting off-duty employees entering the facility without authorization is unlawful.**

Respondent's rule prohibits "unauthorized entry by employee" (JX 2 at 19, Rule 7). General Manager Ledbetter testified that this rule is justified by Respondent's legitimate interest in maintaining control of who enters the facility in order to protect product safety and the safety of on-duty employees. (Tr. 296-97, 306-08). Respondent, however, provided no examples as to the circumstances in which off-duty employees would be permitted to enter the facility and when they would not.

Under Board law, employees who work at Respondent's facility, and who are off-duty, may not be denied access to the interior of the facility to engage in protected concerted activities absent a lawful rule barring entry to those areas by off-duty employees.<sup>3</sup> Under *Tri-County Medical Center*, such a no-access rule is lawful only if it "(1) limits access solely with respect to

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<sup>3</sup> See *Baptist Memorial Hosp.*, 229 NLRB 45, 45 n.4, 49-50 (1977) (in case involving employees distributing handbills in hospital lobby and on sidewalk, Board majority concluded "off-duty employees have a right to remain on or to enter the [e]mployer's premises for solicitation or distribution of union literature subject only to the [e]mployer's need to maintain production, discipline, or security"); *Piedmont Gardens*, 360 NLRB 813, 813-14 (2014) (employer maintenance of rule restricting off-duty employees access to interior areas held facially unlawful because rule was invalid under *Tri-County* by not barring access for any purpose).



the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.”<sup>4</sup> If an employer’s rule fails to satisfy each of these three conditions, employees who are off-duty are entitled access to the interior non-work areas of the facility for Section 7 purposes.<sup>5</sup>

Applying these principles here, Respondent’s maintenance of its no-access rule is unlawful because the rule fails to satisfy the third element of the *Tri-County* test since there is no blanket prohibition of facility access for off-duty employees for *any purpose*. Respondent presented no evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied.<sup>6</sup> As the Board stated in *Casino San Pablo*, allowing access only with management’s approval “effectively vests management with unlimited discretion to expand or deny off-duty employees’ access for any reason it chooses.” *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6 (2014); *Saint John’s Health Center*, 357 NLRB at 2080-83 (finding rule denying off-duty employees access to interior of facility unlawful where it was not blanket prohibition but “permitted access to the building to attend [employer-] sponsored events, such as retirement parties and baby showers”; Board majority concluded rule told employees “you may not enter the premises after your shift except when we say you can”). Thus, Respondent’s maintenance of its no-access rule violates Section 8(a)(1).

#### **IV. Conclusion**

For the reasons stated above, the General Counsel requests that the ALJ give further consideration to Respondent’s “damage to business or reputation” rule, the “company time” rule,

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<sup>4</sup> *Tri-County Medical Center*, 222 NLRB at 1090.

<sup>5</sup> See *Baptist Memorial Hosp.*, 229 NLRB at 45 n.4, 49-50; *Piedmont Gardens*, 360 NLRB at 814.

<sup>6</sup> See *Piedmont Gardens*, 360 NLRB at 814 (finding employer’s no-access rule for off-duty employees unlawful despite employer’s claim it permitted access only in three limited circumstances because evidence did not establish these were only circumstances under which employer had granted interior access).

the “off-duty conduct” rule and the “unauthorized employee access” rule, as alleged in the Second Consolidated Complaint at paragraphs 7(b), 7(b)(i), 7(b)(ii) and 7(c) and find that each of these rules violate Section 8(a)(1). Further, the General Counsel respectfully requests that the ALJ dismiss the allegations at paragraphs 7(a), part of 7(b) and 7(b)(iii) pleading the “accepted standards of behavior” rule and rules pertaining to video and audio recordings to be unlawful, in accordance with the parties’ stipulation of dismissal.

Dated at Memphis, Tennessee this 1<sup>st</sup> day of February 2019.

*/s/ Linda Mohns*

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LINDA MOHNS  
COUNSEL FOR THE GENERAL COUNSEL  
NATIONAL LABOR RELATIONS BOARD  
SUBREGION 26, REGION 15  
80 MONROE AVENUE, SUITE 350  
MEMPHIS, TENNESSEE 38103

## CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, a copy of Counsel for the General Counsel's Brief on Remand to the Administrative Law Judge was electronically filed via NLRB E-Filing with the Division of Judges.

Arthur J. Amchan  
Deputy Chief Administrative Law Judge  
Division of Judges  
1015 Half Street, SE  
Washington, DC, 20570-0001

I further certify that on February 1, 2019, a copy of Counsel for the General Counsel's Brief on Remand to the Administrative Law Judge was served by e-mail on the following:

David L. Swider, Esq. and  
Sandra Perry, Esq.  
Philip Zimmerly, Esq.  
Bose McKinney & Evans, LLP  
111 Monument Circle, Suite 2700  
Indianapolis, IN 46204

**E-Mail:** dswider@boselaw.com  
sperry@boselaw.com  
pzimmerly@boselaw.com

Anthony Shelton  
Bakery Confectionery, Tobacco Workers  
And Grain Millers International Union  
1718 Ray Joe Circle  
Chattanooga, TN 37421

**E-Mail:** Anthony\_28662@msn.com

I further certify that on February 1, 2019, a copy of Counsel for the General Counsel's Brief on Remand to the Administrative Law Judge was served by regular mail on the following:

Rickey Ledbetter  
Southern Bakeries, LLC  
2700 E. Third Street  
Hope, AR 71901-6237

\_\_\_\_\_/s/  
Linda Mohns  
Counsel for the General Counsel